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C O N F I D E N T I A L SECTION 01 OF 02 SARAJEVO 000526

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DEPARTMENT FOR EUR(DICARLO), EUR/SCE(HOH/FOOKS),
S/WCI(WILLIAMSON; NSC FOR BRAUN

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SUBJECT: BOSNIA - HIGHREP BALKS AT ANNULING CONSTITUTIONAL
COURT DECISION

REF: SARAJEVO 433

Classified By: Political Counselor Michael J. Murphy. Reason 1.4(b) and (d).

11. (U) This is an action message. See paragraph six below.

12. (C) High Representative Christian Schwarz-Schilling convened a special session of the Steering Board Ambassadors (SBA) on March 7 to discuss the recently released decision by the Bosnian Constitutional Court calling on the Bosnian government to address human rights violations stemming from OHR's 2004 removal from office of two Republika Srpska (RS) officials who had abetted war criminals (Reftel). SBA Political Directors had expressed their concern at the February 26-27 Peace Implementation Council (PIC) that the Court's decision directly challenged Dayton, the HighRep's authority, particularly the Bonn Powers, and several Chapter VII UN Security Council Resolutions (UNSCR).

13. (C) The HighRep described the Court's ruling as unclear and contradictory. (Note: The Court called on the Bosnian government to respect its international obligations, including those under Dayton, but also concluded that it had an obligation under Bosnia's constitution and the European Convention on Human Rights to protect the appellants right to appeal. End Note). Schwarz-Schilling reported that he was considering two options: annulling the decision, or issuing an interpretation of it. The HighRep said he was leaning towards issuing an interpretation that would provide the Bosnian government with a means of implementing the decision consistent with Dayton and UNSCRs. Before acting, however, Schwarz-Schilling said he planned to consult with human rights experts at the Council of Europe, the Venice Commission, OSCE, and the United Nations, noting that he had already sent a letter on the issue to the President of the Security Council.

14. (C) Two concerns were driving his preference for an interpretation, Schwarz-Schilling explained. First, he worried that annulling the decision would undermine the Constitutional Court, something he wished to avoid. Second, he accepted that there were legitimate human rights concerns associated with use of the Bonn Powers for removals that needed to be addressed. OHR staff explained that the interpretation, which would have the force of law, could involve directing the Bosnian government to implement the decision by requesting that the PIC or OHR set up a review

mechanism to address the issues raised by the Constitutional Court. The PIC or OHR could then simply acknowledge that the Bosnian government had brought the issue to its attention. (Comment: After the meeting, OHR staff suggested the interpretation could take another form, but did not offer specifics. Whatever form an interpretation took, we doubt the HighRep, given his past behavior, would simply ignore the Bosnian government's response to it. End Comment.)

15. (C) The SBA agreed with OHR's analysis that the Constitutional Court's decision had serious implications for use of the Bonn Powers. Bosnian authorities could establish their own review mechanism to block HighRep removal decisions, judicial authorities could review and overturn such decisions, and/or administrative authorities could refuse to implement them. There was a general consensus that OHR needed to act forcefully to confront this challenge, though only Japan and Turkey joined us in arguing that the HighRep should annul the Court's decision. France and Italy urged the HighRep to be assertive, but did not explicitly endorse either of the HighRep's proposals. The UK indicated that an interpretation might be acceptable, but not along the lines described by OHR staff. Russia rejected the Constitutional Court's authority to review the HighRep's decisions and challenge UNSCRs, but suggested the issue might be best addressed by the Security Council. Others were largely silent.

16. (C) Action Request: The HighRep does not appear prepared to take a clear stand on this issue or to act forcefully to defend Dayton. Instead, he has made human rights concerns about the Bonn Powers an issue of equal significance to preserving the authority of the Bonn Powers themselves. His

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interpretation proposal, which in our judgment falls short of addressing the concerns raised by the PIC in February, would put the onus others to act (i.e. the PIC). We will have to push him hard to secure an outcome that protects Dayton and does not undercut our efforts to ensure Bosnian authorities cooperate fully with ICTY. In this context, it would be useful to have soonest a clear statement from Washington that we could deliver to him.

MCELHANEY